United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1078

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76 - 1078

UNITED STATES OF AMERICA

APPELLEE

-v-

JEROME DANIELS

APPELLANT

BRIEF FOR THE APPELLEE

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

DAVID MARGOLIS
ATTORNEY IN CHARGE
BROOKLYN STRIKE FORCE

DAVID J. RITCHIE
SPECIAL ATTORNEY
(OF COUNSEL)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 76 CR 1078

UNITED STATES OF AMERICA,

Appellee

v.

JEROME DANIELS,

Appellant

BRIEF FOR THE APPELLEE

PRELIMINARY STATEMENT

JEROME DANIELS appeals from a judgment of conviction imposed by Henry Bramwell, United States District Judge of the Eastern District of New York, on February 18, 1976.

On September 22, 1975, the appellant pleaded guilty to one count of giving an unlawful gratuity to an Internal Revenue Service agent, in violation of Title 18, United States Code, Section 201(f), the maximum penalty for which crime is two years incarceration and a $10,000 fine.

On December 9, 1975, the defendant was sentenced to six months' imprisonment and a $5,000 fine. The sentence was imposed under the

medical study and report provision of Title 18, United States Code, Section 4208(b). On February 18, 1976, after receipt of the Bureau of Prisons report, hearing requested by the defendants was held, in which oral testimony was elicited from two.Government medical experts. Subsequent to the oral testimony and the submission of letters to the Court from defense experts, the Court accepted the c nclusion of the Government experts and found that the Bureau of Prisons had the facilities to provide medical and psychiatric treatment and assistance to the defendant during his incarceration. The Court then resentenced the defendant to a term of three month's incarceration, with a recommendation that incarceration be served at the Northeast Psychiatric Referral Center of the Bureau of Prisons at Danbury, Connecticut.

The appellant now asks this Court to reverse the District Court's finding of fact or, in the alternative, to remand the case to the District for resentencing on the grounds that the District Court in imposing its original sentence took into account another count of the indictment.

STATEMENT OF THE CASE

A. Proceedings below

On December 16, 1974, the appellant was indicted by the Grand Jury of the United States District Court for the Eastern District

of New York in a four-count indictment charging him with Income Tax Evasion, Bribery of an Internal Revenue Service Agent, and Giving of an Unlawful Gratuity to Such Agent. (Title 26, United States Code, Section 7201; Title 18, United States Code, Sections 201, 371, and 2)

On September 22, 1975, the defendant pleaded guilty before Judge Henry Bramwell to the crime of giving an unlawful gratuity, which is punishable by a maximum term of imprisonment of two years, and a $10,000 fine.

Prior to sentencing on December 9, 1975, the defendant submitted a presentencing memorandum of his own. (Sentencing Minutes, December 9, 1975, at 7)

At the time of sentencing, the defendant's counsel called to the Court's attention certain purported inaccuracies in the Court-ordered presentencing report. (Sentencing Minutes, at 7-11, 14) In particular, counsel called to the Court's attention the fact that the presentence report ordered by the Court referred to another count of the indictment, which was to be dismissed, and that there had been no proof as to those counts. The Court then noted that he knew that the charges were not before the Court but that the charges of income tax evasion could not be wholly unfounded because it was out of the tax investigation that the giving of an unlawful gratuity arose. (Sentencing Minutes, at 10) The defendant's counsel acknowledged the causal nature of a possible tax charge and concluded his objection

by noting that he didn't "want the Court to believe that there wasn't any defense to these charges." (Sentencing Minutes, at 11) After the defendant personally exercised his right of allocation, Judge Bramwell sentenced the defendant to a term of imprisonment of six months and a $5,000 fine, under Title 18, United States Code, Section 4208(b), with a study and report ordered. The Court stated that his reason for ordering the report was because he was "disturbed" by letters received from Daniels' physicians. (Sentencing Minutes, at 13)

By letter dated December 15, 1975, Warden Taylor of the Metropolitan Correctional Center informed Judge Bramwell that the defendant had been examined, found to suffer certain maladies, but to be capable of serving a period of incarceration if certain circumstances were met.

On February 18, 1976, at the request of the defendant, a hearing was conducted. At that time, Dr. Naomi Goldstein, the staff psychiatrist at the Metropolitan Correctional Center, testified to the results of her examination of Mr. Daniels. She agreed, in large part, with the diagnoses of the defendant's doctors. On direct examination, in response to a question concerning whether Mr. Daniels could be given sufficient psychiatric and custodial care to ensure his safety during incarceration, Dr. Goldstein testified that she believed the Bureau of Prisons could deal with any problem of that sort. She further

testified that such incarceration should be in a facility equipped with psychiatric services. She did note that, of course, there always could be a suicide attempt on his part despite even unlimited psychiatric services. (Hearing Minutes, at 6-7)

On cross-examination, she characterized the facilities at the D nbury facility as being staffed by two "very expert" psychiatrists, and described the level of care as being of "very high quality." (Hearing Minutes, at 8) She also testified that incarceration is psychologically damaging and that a man with psychiatric problems of the sort in question would be "more damag(ed)." (Hearing Minutes at 14)

Dr. Anthony Ruggiero, a staff physician at the Center, testified to the results of his examination of Mr. Daniels. His diagnosis was basically the same as that of Mr. Daniel's doctors. On direct examination, Dr Ruggiero testified that a patient with the same physical maladies as Mr. Daniels had could be adequately cared for at the Northeast Region Psychiatric Center at Danbury. (Hearing Minutes, 19-20) On cross-examination, the witness did testify that placing Mr. Daniels in a prison would have greater "medical ramifications" because of his condition. On redirect, the witness testified that proper diet and attention to the man's blood pressure, in a prison setting, could reduce the possibility of any medical damage to the defendant. (Hearing Minutes, at 26-28) After appellant's counsel read into the record certain letters submitted by his doctors, the Court stated his belief that the Bureau of Prisons had the facilities to care for Mr. Daniels. (Hearing Minutes at 38-39)

The Court then resentenced Mr. Daniels to three months incarceration, with a recommendation that his incarceration be at the Psychiatric Center at Danbury.

B. Summary of Arguments

Appellant appeals from the sentence and asks this Court to reverse the District Court's finding that the Bureau of Prisons has the facilities to provide medical and psychiatric treatment and assistance to the appellant, or in the alternative, to remand the case for resentencing only on proper considerations. In its broadest expanse, appellant's argument calls upon the Court to discard its practice of limited review of sentencing. More particularly, the appellant argues that the Court's finding concerning his incarcerability was clearly erroneous and that the Court relied on improper considerations in his sentence because he took into account another count of the indictment.

The United States contends that the District Court was fully aware of and gave due and proper consideration to all the available evidence concerning defendant's background, health, and cooperation, and that he did not take into account improper considerations and that the sentence imposed was the product of a fully informed, properly exercised discretion which this Court should affirm.

ARGUMENT

POINT I

The policy of the federal appellate courts, posing broad discretionary powers in the trial judge to determine the proper sentence in each case, rests on sound principles of judicial administration and should not be abandoned.

The appellant invites this Court to renounce its practice of limited review of sentences and, by implication, to examine the facts de novo in each appellate case which raises the terms of a sentence as an issue. The course suggested by the appellant may be an improvident if not impossible added burden for appellate courts to assume. They rely upon the judgment, expertise, and impartiality of the trial judge in conducting trials, accepting pleas and imposing sentences.

The United States Supreme Court has recently restated the principle recognized in Gore v. United States, 357 U.S. 386, 393 (1958) and Townsend v. Burke, 334 U.S. 736, 741 (1948) and adhered to by this Circuit, that "once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." Dorszynski v. United States, 418 U.S. 424, 436 (1974); see also United States v. Tucker, 404 U.S. 443, 446 (1972); United States v. Malcolm, 432 F.2d 809, 814 (2d Cir. 1970); Woolsey v. United States, 478 F.2d 139, 142 (8th Cir. 1973).

POINT II

The sentence imposed on appellant is in all respects proper and the product of the fully informed, properly exercised discretion of the trial judge.

Appellant contends that the trial court made a clearly erroneous finding of fact with respect to the ability of the Bureau of Prisons to care for the appellant and improperly abused its discretion in considering improper factors in sentencing. We examine these objections seriatim.

The appellant in his first point states that the District Court was clearly erroneous in his finding of fact and should be reversed. In support of his conclusion, the appellant cites Rule 52 of the Federal Rules of Civil Procedure. The defendant gives no support for the application of a civil rule to this matter. However, that rule has been used in appellate review of criminal cases where a judge sat as trier of fact. United States v. Page, 302 F.2d 81, 85 (9th Cir. 1962). This court has used the "clearly erroneous" test in review of fact finding by trial courts, United States v. Gerry, 515 F.2d 130, 137 (2d Cir.) cert. denied, __ U.S. __ (1975).

Assuming the applicability of Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950), cert. denied, 340 U.S. 810 (1951), nevertheless, appellee respectfully submits that the trial court's finding was not "clearly erroneous." There certainly was no dispute on the diagnosis. However, there was a clear-cut dispute on the prognoses

proferred by the two parties' experts. The appellant's doctors' uniform conclusions, based on the undisputed diagnosis, were such that the Court, if it credited their conclusions, would have made a different finding of fact. The Government's doctors conclusions, based on the same undisputed diagnosis, were such that, when the Court credited their testimony, he made the finding of fact that he did. This record certainly differs from that found in "Orvis (b)(1) category." (Appellant's Brief at 15)

In Orvis, the Court held that where the evidence is in part oral and in part written and the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, the reviewing Court can reverse the fact finding of the trial Court, 180 F.2d at 539-40. Appellant argues that because the diagnosis is undisputed and because appellant's doctors uniformly predict due consequences and because the Government's doctors refused to speculate on the appellant's life expectancy, therefore their credibility is doubtful.

The United States respectfully submits the appellant has shown no undisputable fact, but has merely marshalled consistent opinions from his own experts.

That appellant's experts uniformly conclude a dire prognosis does not make their prediction an "undisputable fact" as in Orvis. The precise reason for the hearing was to resolve a conflict between experts through the time tested tool of oral examination.

The precise task facing the trial court was an assessment of the witnesses' qualifications and credibilities. Having had the opportunity to assess the Government's witnesses demeanor under direct and cross-examination, the Court chose to credit their testimony. The trial court's finding is supported by the oral testimony. That testimony was tested in cross-examination. Since the written evidence in opposition is not indisputable, this court should affirm the findings of the trial court, because of his ability to assess demeanor. 1[illegible].2d at 538-39.

The appellant's second contention is that the court abused its discretion because it considered a crime from a count of the indictment, to which the defendant did not plead.

Appellant cites no support for his argument that Judge Bramwell would be relying on improper considerations in considering crimes which formed the basis for other counts of the indictment. His argument is that because the Government dismissed a few minutes later and because the defendant maintained his innocence of the charge, that therefore, the court was foreclosed from assessing that related conduct in arriving at his sentence.

This court has never taken such a position. On the contrary, this court has recognized the trial judge's duty to consider not only favorable factors but also just such unfavorable factors in exercising his sentencing discretion. United States v. Needles, 472 F.2d 652 (2d Cir. 1973).

As this court said in Needles, "'few things could be so relevant' . . . 'as other criminal activity . . . related to the crime at hand.'" 472 F.2d at 655. It should also be noted that the court recognized the proper weight to be given to the evasion count. At one point, the court stated "I know it's not before the court . . ." (Sentencing Minutes, at 10) At another point, the court stated that he realized that there might be a defense to the charge of evasion. (Sentencing Minutes, at 11)

Appellee respectfully submits that a review of the record below reveals, beyond peradventure, that this appellant received not only his due but every possible consideration. In this case, the exact scope of any promises was set forth in writing. The court was exhaustively informed of the appellant's cooperation not only in writing but also in personal representations made by various prosecutors. Not only did the court consider appellant's doctor's letters, he ordered a study and report and an evidentiary hearing. The court's sentence came only after receipt and consideration of a mass of mitigating information. The obvious consideration of the court for the defendant's physical condition and cooperation is manifest in the manner in which he not only halved the sentence after learning of the appellant's further cooperation (Hearing Minutes, 40-44), but also in his specific recommendation of the Psychiatric Referral Center as the place of confinement.

CONCLUSION

The sentence of the appellant should be affirmed.

Dated: March 23, 1976
Brooklyn, New York

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

DAVID MARGOLIS
Attorney-in-Charge
Organized Crime and
Racketeering Section

By: David J. Ritchie
Special Attorney
(Of Counsel)

Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYNN A. KURTZ, being duly sworn, says that on the 23rd day of March, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Peter Fabricant, Esquire
186 Joralemon Street
Brooklyn, N.Y. 11201

Lynn A. Kurtz
U. S. Dept. of Justice

Sworn to before me this
23rd day of MARCH, 1976
Diane J. Kane
NOTARY PUBLIC, STATE OF NEW YORK
NO. 41-4617917 - QUALIFIED IN
QUEENS COUNTY - COMMISSION EXPIRES
3-30-77

AFFIDAVIT OF PERSONAL SERVICES

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

_____, being duly sworn, says that he is employed in the office of the United States Attorney for the Eastern District of New York. That on the _____ day of _____, he served a true copy of the annexed _____ on the office of _____ attorney for _____ herein, located at _____, Borough of _____, City of New York, by leaving a true copy of same with his clerk or other person in charge of said office.

_____

Sworn to before me this
day of

_____

SIR:

PLEASE TAKE NOTICE that the within will be presented for **settlement and signature** to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19__, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_____, 19__

United States Attorney,
Attorney for _____

To:

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly **entered** herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

Dated: Brooklyn, New York,

_____, 19__

United States Attorney,
Attorney for _____

To:

Attorney for _____

Action No. _____

UNITED STATES DISTRICT COURT
Eastern District of New York

UNITED STATES OF AMERICA

APPELLEE

—Against—

JEROME DANIELS

APPELLANT

BRIEF FOR THE APPELLEE

Bp/Jps

David G. Trager

United States Attorney,
Attorney for EDNY
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ is hereby admitted.

Dated: _____, 19__

Attorney for _____

FP-LC-5M-8-73-7355

David J. Ritchie, Special Atty.
Telephone No. (212) 596-3802